

July 25, 2003

Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

RE: Notice of Written Ex Parte: Copies filed in the proceedings captioned:

In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges. WC Docket 02-361

In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is neither Telecommunications nor Telecommunication Service," WC Docket 03-45

Dear Secretary Dortch:

Both of the above-captioned proceedings raise, as a fundamental issue, the appropriate classification of Voice over Internet Protocol (VOIP) Telephony Services. The FCC has already, elsewhere, tentatively concluded, at least with respect to the services described in the *AT&T* proceeding, that such telephony services are “*telecommunications services*.” In February, NARUC passed a resolution urging the Commission to confirm that conclusion in both dockets and suggesting the Joint Conference be the focal point for a careful examination of this issue.

AT&T asks the Commission to exempt from interstate access charges AT&T's VOIP phone-to-phone telephony service and to “provide guidance” for States that follow the federal rule in assessing intrastate access charges. *AT&T Petition* at 1. AT&T argues that incumbent local exchange carriers (LECs) are unlawfully assessing access charges on AT&T's provision of phone-to-phone VOIP service violating the terms of the Telecommunications Act of 1996 (Act) and the FCC's access charge policy. *Id.* at 2. AT&T describes its service as an offering of “basic phone-to-phone IP telephony” service over Internet backbone facilities. For originating calls, AT&T purchases access service and pays access charges. AT&T, however, terminates calls using the local private business lines purchased from the incumbent LEC, or reciprocal compensation trunks purchased from a competitive LEC. AT&T pays no access charges for these termination services. AT&T maintains that incumbent LECs have begun to deny AT&T the use of end-user local business lines to terminate its service, or are otherwise using Calling Party Number identifiers to assess access charges on AT&T's VOIP calls that terminate over reciprocal compensation trunks. AT&T claims that the incumbent LECs actions are unlawful because such assessment of terminating access charges is regulation of the Internet in violation

of Congressional intent in the 1996 Act and because assessing access charges on phone-to-phone VOIP violates the FCC's access charge policy.

In the second listed docket, pulver.com asks the FCC to declare that its "Free World Dialup" (FWD) is neither "*telecommunications*" nor a "*telecommunications service*" as defined in Section 153(a) of Act. Pulver.com claims that FWD does not fall under the Act's Title II regulatory framework because it charges no fee for service, it only permits members to make calls to other members, there is no access to the public switched network (PSTN), it does not use the North American Numbering Plan (NANP), and FWD provides no transmission capabilities.

In the case of AT&T's "phone-to-phone" IP Telephony, the FCC already said in a report to Congress that phone-to-phone IP Telephony constitutes provision of *telecommunications* over the public switched telephone network.¹ There should be no controversy there over the correct classification of that service. From the end-user's perspective such calls are indistinguishable from regular circuit switched toll calls. Indeed, in the earlier cited report, the FCC stated that the classification of a service under the 1996 Act depends on the functional nature of the end-user offering. In analyzing phone-to-phone IP telephony, the agency observed that ". . . [f]rom a functional standpoint, users of these services obtain only voice transmission, rather than information services . . ." The FCC accordingly tentatively concluded that phone-to-phone IP telephony constitutes a *telecommunications service*" and those offering such service were *telecommunications carriers* within the meaning of Sections 153(46) & (44). Having classified phone-to-phone telephony service, the FCC went on to state that the Act and federal rules impose various requirements on such carriers, including contributing to universal service, paying interstate access charges, and providing disabled access. Indeed, AT&T acknowledges that it currently pays universal service support on the revenues from all its "non-enhanced VOIP calls that it carries over the Internet and that fall within the definition of phone-to-phone IP telephony and of telecommunication services." *AT&T Petition* at 32-33. AT&T would not be obligated to do so unless it were, as NARUC alleges, a telecommunications carrier offering at least some interstate *telecommunications services*. 47 U.S.C. § 254(d).²

But in any case, there is nothing in the Act that evidences any intent that a basic telephony service loses its status as a *telecommunications service* subject to the requirements of the Act and FCC rules simply because it utilizes new technologies or networks, including the Internet, in offering *telecommunications services*. A *telecommunications service* is a *telecommunications service* regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure.³ Moreover, convergent uses and technological innovations in the use of televisions, computers, and wireless devices indicate that regulatory distinctions based on the type of customer premises equipment used to access the network are destined to become meaningless. Perhaps the best thing one can say about the pulver.com petition is that it is premature. Confirming the status pulver.com desires at the stage is unnecessary and, at a minimum, would certainly encourage additional attempts at regulatory arbitrage. NARUC's

¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, 12 FCC Rcd 11501 (1988) (*Universal Service Report*)

² 47 U.S.C. § 254(d) (every telecommunications carrier that provides interstate telecommunications service shall contribute to universal service). These requirements do not apply to ISPs offering information services.

³ *Universal Service Report*, ¶ 95 (Congress did not limit the regulation of *telecommunications service* to circuit-switched wireline transmission.)

resolution specifies that if the FCC chooses to act on pulver.com's request, it should find the service is a *telecommunications service*. Pulver.com makes a number of arguments best addressed after its FWD service matures. For example, they argue that they don't use NANPA resources and cannot access the PSTN. Both those barriers may well be eliminated in the very near term. Certainly, if this country does ultimately opt-in to ENUM and designates a national Country Code it would appear that the barrier for FWD-like services access to the PSTN is eliminated. Granting pulver.com the relief it seeks now would only raise more questions.⁴

The AT&T petition attracted comments from a number of State commissions and the State members of the Federal-State Joint Board on Separations. A decision by the FCC, in this docket or elsewhere, to effectively declare all phone-to-phone calls over IP networks to be information services by virtue of the technology could have negative effects on a range of telecommunications policies, including universal service. Moreover, NARUC believes that VOIP and intercarrier compensation issues are inextricably linked and that a significant portion of the nation's total voice traffic could be transported on IP networks within a few years. Because of these concerns, the resolution solicits the 706 Joint Conference to systematically address issues relating to VOIP and to explore, with the States, the appropriate joint boards, and industry, mutually satisfactory methods of dealing with the related jurisdictional rate and separations issues, including but not limited to reviewing, revising and simplifying the varied existing intercarrier compensation regimes while preserving universal service.

For the reasons discussed, NARUC respectfully requests that the FCC reject these petitions insofar as they require a finding that either service is not a "telecommunications service" and engage the 706 Joint Conference to address these issues.

Respectfully submitted,

_____/s/_____
James Bradford Ramsay
GENERAL COUNSEL

The National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, Suite 200
Washington, DC 20005
Phone: (202) 898-2207
E-mail: jramsay@naruc.org

⁴ The Act defines *telecommunications* as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153(43). *Telecommunications service* is defined as "the offering of *telecommunications* for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §153 (46). If an ILEC offers free payphone service in the aftermath of a disaster, does that service no longer qualify as *telecommunications*? And as for the "for a fee" requirement inherent in the Act's definition of *telecommunications services* - how "indirect" does the compensation for providing an FWD-type service need to be? Special access services - traditionally tariffed at both the state and local level are seem analogous to the pulver.com's offer service "effectively available directly to the public." Nothing in the petition or on its website suggests pulver.com limits access to any member of the public. Some could argue the service is analogous to that of a reseller.

Appendix A - Resolution Relating To Voice Over The Internet Telecommunications

WHEREAS, The Internet is providing opportunities for new methods to originate, transport, and terminate telecommunications, but is also providing new regulatory challenges, and

WHEREAS, AT&T Corp has filed a petition with the Federal Communications Commission requesting in part that the FCC prevent local exchange carriers from assessing interstate access charges on certain phone-to-phone Voice Over Internet Protocol services, pending adoption of final federal rules, and

WHEREAS, In 1998 the FCC reached a tentative conclusion that certain phone-to-phone IP calls may be telecommunications services, even if the carrier converts such a call to IP format and back again, and that a user who receives only voice transmission without other enhancements is receiving a telecommunications service, not an information service, and

WHEREAS, A decision by the FCC, in this docket or elsewhere, to declare all phone-to-phone calls over IP networks to be information services by virtue of the technology could have negative effects on various telecommunications policies, including universal service, and might be inconsistent with the 1996 Act, and

WHEREAS, Voice over the Internet Protocol and intercarrier compensation issues are inextricably linked, and

WHEREAS, A significant portion of the nation's total voice traffic could be transported on IP networks within a few years, now therefore be it

RESOLVED, By the Board of Directors of the National Association of Regulatory Utility Commissioners, convened in its February, 2003 Winter Meeting in Washington, D.C., that the FCC should confirm its tentative decision that certain phone-to-phone calls over IP networks are telecommunications services, and be it further

RESOLVED, That NARUC asks the 706 Joint Conference to systematically address issues relating to Voice Over the Internet Protocol and to explore, with the States and the appropriate joint boards, and with industry, mutually satisfactory methods of dealing with the related jurisdictional rate and separations issues, including but not limited to reviewing, revising and simplifying the varied existing intercarrier compensation regimes while preserving universal service, and be it further

RESOLVED, That NARUC's General Counsel should file with the FCC comments and ex parte presentations consistent with this resolution.

Sponsored by the Committee on Telecommunications

Adopted by the NARUC Board of Directors February 26, 2003